IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2986 OF 2005

Madhukar Shivram Kahandal ... Petitioner

Vs.

The State of Maharashtra & Anr. ... Respondents

Mr. P.L. Bhujbal for the petitioner.

Ms. M.H. Mhatre, A.P.P. for the State.

Mr. H.E. Palwe for respondent 2.

CORAM : SMT. RANJANA DESAI, J.

DATED : 9TH NOVEMBER, 2006.

P.C. :-

1. Rule. Learned counsel for the respondents, waive service. By consent of the parties, taken up for hearing forthwith.

2. The petitioner had filed a complaint against respondent 2 under section 138 of the Negotiable Instruments Act in the Court of Judicial Magistrate, First Class, Nasik being Criminal Case No.5684 of 2003. In that case, on 14/10/2005, advocate for the petitioner made an oral application that he may be permitted to examine the witnesses for the

limited purpose of proving documents at serial Nos.1, 2 and 3 shown in the list of documents to the affidavit dated 30/9/2005. The learned Magistrate rejected the said application. He observed that so far as documents at serial Nos.4 and 5 mentioned in the list of documents are concerned, in view of the presumption under the Negotiable Instruments Act, they can be marked as exhibits. However, according to him, for the purposes of proving the remaining three documents, the petitioner cannot be allowed to examine the witnesses. The learned Magistrate observed that once the affidavit of examination in chief is on record, the party cannot be permitted to lead separate oral evidence, even for the purposes of proving the documents, which ought to have been done in the affidavit itself. He, therefore, dismissed the application. The petitioner has challenged the said order.

3. In my view, the impugned order is clearly illegal. The learned Magistrate erred in holding that once affidavit of evidence is filed, a person cannot examine the witnesses for the purposes of proving the documents mentioned in the list of documents. This view is clearly contrary to the decision of this court in ***Peacock Industries Ltd. & Ors. v. M/s. Budhrani Finance Ltd. & Anr., 2006 ALL MR (Cri.) 2233***. In that case, this court was concerned with a similar question. The relevant observation of the court may be quoted.

"Insofar as the right of the prosecution to "examine" a witness as provided for in section 145(2) is concerned, it means the right of "examination-i-chief" and "re-examination" of a person who has given his evidence on affidavit and has been cross-examined. The right of "re-examination" is not in dispute. Insofar as the right of examination-in-chief is concerned, it can be exercised by the complainant in a case where he has given his evidence (examination-in-chief) on affidavit and filed documents with it, and if the objection raised by the accused is directed towards the mode of proof a leging the same to be irregular and insufficient. If such objection to the document/s is raised, after filing of the document with the affidavit in lieu of examination-in-chief that would enable the party tendering the evidence on affidavit or otherwise to cure the defect and resort to such mode of proof as would be regular. The complainant cannot assume while giving evidence on affidavit that such an objection would be raised though he is expected to be vigilant while filing affidavit to see

that no objections are raised. If an objection as to the mode of proof is raised and if the complainant under section 145(2) applies for tendering further evidence (examination-in-chief) by stepping into witness box to cure such defect and resort to such mode of proof as would be regular, the Court will have to allow the complainant to give further examination-in-chief to cure the defect before the cross-examination begins. It is this right which, in my opinion, can be exercised by the complainant under sub-section (2) of Section 145. In short, the word "examine" confers right on the complainant to examine himself or his witness in chief, who has given his evidence (examination-in-chief) on affidavit, particularly if the objection to the document/s to be exhibited, is directed towards the mode of proof alleging the same to be irregular or insufficient, to cure the same by resorting to such mode of proof as would be regular."

4. In view of the above, in my opinion, the order dated 14/10/2005 passed by the Judicial Magistrate, First Class, Nasik, must be set aside

and is set aside as such. The petitioner/complainant is permitted to lead oral evidence only for the purposes of proving the documents at serial Nos.1, 2 and 3 in the list of documents. Needless to say that after the petitioner leads evidence-in-chief for proving the said documents, the respondents will be at liberty to cross-examine his witnesses.

5. So far as the order of the same date passed on Exhibit-H is concerned, the learned counsel for the petitioner states that he does not wish to challenge the said order.

6. The petition stands disposed of in the aforestated terms.

[SMT. RANJANA DESAI, J.]